BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS B. LOYA Claimant VS. **KAW VALLEY DRAINAGE BOARD** Respondent AND **CONTINENTAL WESTERN INS. CO.** Insurance Carrier	)	Docket No. 1,009,091

ORDER

Respondent and its insurance carrier request review of the May 19, 2003, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The claimant alleged he suffered a series of repetitive injuries to his low back until he was placed on light-duty work on June 27, 2002. After back surgery was performed in February 2003, the claimant filed an application for preliminary hearing on March 5, 2003, seeking temporary total disability compensation as well as continuing medical treatment.

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment and awarded temporary total disability benefits beginning with the date of surgery.

The respondent noted the ALJ's decision referred to an admitted back injury claimant suffered in 1996 and raised the following issues on review:

> A. The statute of limitations has expired since the 1996 injury and accordingly no further benefits are allowable;

> B. There is no evidence of another accident or of an aggravation of the prior condition which would allow for the filing of a new claim;
>
> C. Contrary to the opinion of the court that the employer provided no evidence of a lack of a new injury, the claimant's supervisor and childhood friend testified the claimant told him that he had not injured himself on the job;
>
> D. The claimant returned to full time work following his medical release in 1996 and worked without restrictions until June 27, 2002;
>
> E. If there was a new injury, the claimant gave no notice of a [sic] that injury;
>
> F. No demand was made for medical treatment and the employer has been prejudiced by the lack of notice and the resultant lack of control over the medical.[1]

Claimant argues that after his back injury in 1996 he suffered a series of work-related aggravations to his lower back performing his job for respondent and that he told his supervisor that his continuing low back problems were related to his work. Consequently, the claimant requests the ALJ's Preliminary Decision be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered a work-related injury to his lower back when he fell at work in October 1996. Claimant was provided conservative medical treatment for approximately six weeks and then released to his regular job duties without restriction. Claimant admitted he never made written claim for compensation for the 1996 accident.[2]

Claimant continued working and never requested that respondent provide any additional medical treatment for his back. Approximately a year after claimant was released to return to work he sought treatment for his back from his family physician but never advised respondent that such treatment was due to the 1996 work-related injury.[3] The record does not indicate the frequency of office visits but it appears claimant continued to receive occasional medical treatment for his back from 1997 through 2002.

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[1] Respondent's Brief at 2 (filed Jun. 25, 2003).

[2] P.H. Trans. at 26.

[3] Id at 19.

On June 27, 2002, claimant's family physician provided restrictions against lifting more than 10 pounds and respondent provided claimant with light-duty work. Claimant testified that although he could not remember when, nonetheless, he told his supervisor that his back problems were work related. He further testified:

> Q. (Mr. Quinn) Okay. I want to make sure I understand. It's your testimony that you told Ernie Quinto, the gentleman sitting here next to me, that when you were getting medical treatment for your back in '97, '98, '99, 2000, 2001, and 2002 that that was because of your on-the-job injury?
>
> A. (Claimant) Yes.
>
> Q. So for all that period of time Ernie should have known this was a work-related injury?
>
> A. I don't know if he knew all that period of time. I don't know if I told him back that many years ago, but I know I mentioned it to him. Now, whether he remembered or not, I don't know.[4]

Claimant's supervisor and longtime friend, Ernest P. Quinto, agreed claimant had complained about back pain but denied claimant said it was work related. Instead Mr. Quinto testified:

> Q. (By Mr. Quinn) If you could, tell the judge when this happened.
>
> A. June the 27th when the restriction was imposed on Tom from a doctor.
>
> JUDGE FOERSCHLER: This one right here (indicating)?
>
> THE WITNESS: Yes.
>
> A. Just before that Tom told me he was going to go to the doctor to seek some advice on what was wrong and came back and showed me that he was on restricted light duty.
>
> Q. (By Mr. Quinn) And was there any discussion whether this was caused by the on-the-job --
>
> A. Oh.
>
> Q. By an on-the-job injury or not?

[4] P.H. Trans. at 19-20.

A. Not on the job, he told me it was not on the job.[5]

Claimant remained on light-duty work and received conservative treatment. At the end of December 2002, the respondent sent a letter advising claimant that he was being given a leave of absence. In February 2003, claimant had a posterior decompressive laminectomy with an instrumented fusion and iliac crest bone graft. Claimant agreed that he never requested that respondent provide treatment or pay for the surgery.[6]

Between 1996 and the surgery in 2003, the claimant had additional work-related injuries to his knee, his chest and also suffered a burn injury. Claimant requested and was provided treatment for those injuries.

It is clear that claimant did not file timely written claim for the accident that occurred in 1996. Respondent argues claimant testified the fall in 1996 was the only back injury he ever suffered. Consequently, respondent argues this claim should be denied. This argument overlooks claimant's further testimony that as he continued working his back pain progressively worsened. And this claim was for a series of aggravations to his low back through June 27, 2002.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[7] Dr. R. Sean Jackson opined that claimant's repetitive bending and lifting at work contributed to the development of claimant's back pathology. Consequently, the claimant has met his burden of proof to establish he suffered aggravation to his preexisting lower back condition as he performed his regular job duties through June 27, 2002.

The controlling issue is whether claimant provided timely notice of injury. K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. The time for giving notice can be extended up to 75 days for just cause. Claimant alleges he told his supervisor that his continuing back problems were work related. Claimant's supervisor denies that he was told claimant's back problems were work related and instead alleges that claimant specifically denied his back problems were caused by work.

It is significant to note that throughout the intervening years after his initial back injury in 1996 the claimant sought and received medical treatment for his back but he never requested that respondent provide that treatment. And when he suffered other work-

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[5] Id. at 36-37.

[6] Id. at 27.

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

related injuries during this time period he requested and received treatment from the respondent for those injuries. Moreover, claimant agreed that he never requested respondent provide treatment for his back even after surgery was recommended. This supports the supervisor's testimony that claimant never provided notice that work was causing his back problems.

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports claimant's contention that he injured his back at work but fails to support claimant's contention that he told his supervisor that his injury was work related, as required by K.S.A. 44-520. The Board, therefore, finds the ALJ's Order granting claimant preliminary benefits should be reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.

AWARD

WHEREFORE, it is the finding, of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated May 19, 2003, should be, and is hereby reversed and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

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BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director